United Nations **AT**

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1069

Case No. 1157: MADARSHAHI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Ms. Marsha Echols; Ms. Brigitte Stern;

Whereas, on 7 October 1996, Mehri Madarshahi, a staff member of the United Nations, with the agreement of the Respondent, filed an Application in direct submission under article 7 of the Statute of the Tribunal against a decision to redeploy her in accordance with the provisions of administrative instruction ST/AI/415 of 2 April 1996, entitled "Redeployment of Staff", which was promulgated pursuant to General Assembly resolutions 50/214 and 50/215 of 23 December 1995. In addition, she requested that the Tribunal declare administrative instruction ST/AI/415 null and void.

Whereas, on 5 December 1996 and on 17 October 1997, a number of Applications for intervention were filed in the case;

Whereas, on 26 November 1997, the Tribunal rendered Judgement No. 864, *Madarshahi*. The Tribunal found that the parties lacked "real agreement" as to the terms by which they had agreed to direct submission of the case and that, in any event, it lacked the competence to render an advisory opinion. The Tribunal held that, "[s]ince the Tribunal is not competent to render in

abstracto opinions on the interplay of legal rules, and since there remain disputed questions of fact between the parties, the Tribunal finds that the [A]pplication should follow the ordinary procedure of consideration by the [Joint Appeals Board (JAB)]", and "remanded [the case] to the JAB for consideration on the merits". In addition, the Tribunal rejected the Applications for intervention as premature.

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended the time limit for the filing of an application with the Tribunal until 31 December 2000;

Whereas, on 28 September 2000, the Applicants filed an Application containing pleas which read, in part, as follows:

"Section II: PLEAS

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

(c) *to decide* to hold oral proceedings ...;

(d) *to order* that those Applications for intervention submitted with respect to the Applicant's previous application be considered receivable and that any decision made in the present Application be applied *mutatis mutandis* to those cases.

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *to rescind* the decision of the Secretary-General not to accept the [JAB's] recommendation for compensation and to take no further action on her case;

(b) *to find and rule* that, notwithstanding their finding that the Applicant's rights to due process were infringed, the [JAB] erred as a matter of law and equity in failing to provide appropriate and adequate compensation ...;

(c) *to award* the Applicant ... three years' net base pay for the actual, consequential and moral damages ...;

(d) *to order* that the Applicant be immediately reinstated in her former post or in a regularly budgeted and established post commensurate with her skills

and abilities and that she be afforded consideration for promotion to the D-1 level, with retroactive effect from May 1996, in light of the damage to her career and professional reputation.

(e) *to find and rule* that administrative instruction ST/AI/415 dated 2 April 1996 is null and void and should be immediately rescinded;

(f) *to fix* ... the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(g) *to award* the Applicant as cost, the sum of $10,000.00 in legal fees and $500.00 in expenses and disbursements and an additional $25,000 in legal expenses to the United Nations Staff Union ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 April 2001 and periodically thereafter until 31 January 2002;

Whereas the Respondent filed his Answer on 19 November 2001;

Whereas, on 15 February 2002, the Applicant amended her pleas as follows:

"Paragraph 8:

Following subparagraph (g) add the following:

(h) *to award* the Applicant interest at the rate of 8% from 1 May 1996 in light of the delays in adjudicating her case."

Whereas the Applicant filed Written Observations on 21 February 2002;

Whereas, on 8 July 2002, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case were set forth in Judgement No. 864.

Whereas the JAB adopted its report on 1 May 2000. Its conclusions and recommendations read, in part, as follows:

"***Conclusions and Recommendations***

49. ... [T]he Panel unanimously agreed that the due process rights of the [Applicant] have been infringed by the failure to establish a joint department panel and to conduct a

comparative review prior to subjecting her to redeployment.

...

52. ... [T]he Panel *unanimously recommends* that the [Applicant] be given redress for the infringement of her due process rights in [the] form of financial compensation equal to three months net base salary."

On 8 June 2000, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"...

The Secretary-General considers that, as is made clear in ST/AI/415, the purpose of the comparative review was to assess staff at the same level who were discharging similar functions within an Office. Your functions were unique within [the Office of Human Resources Management (OHRM)] and, as no other staff member in that Office was performing similar functions, it was not necessary to conduct such a comparative review. The Secretary-General has therefore decided not to accept the Board's recommendation for compensation and to take no further action in your case.

..."

On 28 September 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The provisions of ST/AI/415 are at variance with the traditional application of staff rule 109.1 (c) and violate the contractual and acquired rights of staff members holding permanent appointments.

2. The Respondent failed to respect the limited requirements of due process in ST/AI/415, and the Applicant's rights were denied in an arbitrary, improper and discriminatory fashion.

3. The Applicant suffered damage to her career and professional reputation as a result of the redeployment, and her chances for promotion have been curtailed.

Whereas the Respondent's principal contentions are:

1. The redeployment was a programmatic decision and a valid exercise of the discretionary authority of the Secretary-General.

2. The application of ST/AI/415 did not violate the Applicant's rights of due process or "acquired rights".

3. Selection of the Applicant for redeployment was not motivated by discrimination, prejudice or any other extraneous factor.

The Tribunal, having deliberated from 28 June to 26 July 2002, now pronounces the following Judgement:

I. As a consequence of the Applicant's redeployment, after various vicissitudes she ended up occupying a P-5 post in the Office of the Special Coordinator for Africa and the Least Developed Countries, Department of Economic and Social Affairs. The Tribunal notes that the Respondent contends this post is "permanent", in other words that it is a budgeted post and roughly equivalent to the one the Applicant originally held, whereas the Applicant contends that her current post is only temporary (a borrowed post slated for abolition) and that she is at present, in fact, a supernumerary. Notwithstanding the dispute as to the nature of the Applicant's post, it must be borne in mind that she has not been involuntarily separated from the Organization. She continues to hold a permanent contract with all the rights and privileges thereof. Accordingly, her case is not one of termination but of other damages which the Applicant alleges she suffered as a result of the redeployment exercise and the incorrect application of the Staff Regulations and Rules.

The Applicant maintains that she has suffered considerable prejudice due to her redeployment: she was moved to a department where she could not display her skills and, as a consequence thereof and by virtue of being in the group of redeployed staff members who she characterised as the "deadwood" of the Organization, her possibilities for promotion were jeopardized. Further, the Applicant contends that she was humiliated by the change in her conditions of employment when she was redeployed and treated as a newcomer, and that she felt harassed because of the persistent attitude of hostility of the Assistant Secretary-General, OHRM.

II. The Tribunal considers that the core issue in this case lies in the legality of the Secretary-General's decisions to remove the Applicant from her post and assign her to a number of temporary posts before placing her in the post she presently encumbers.

The Tribunal is satisfied that staff regulation 1.2 grants the Secretary-General the discretionary power to assign staff members to any of the activities or offices of the Secretariat. That power is, of course, subject to the usual limitations: namely, respect for due process, and the absence of bias, discrimination, arbitrariness, or other extraneous motivations. In the instant case, the Applicant contends that staff rule 109.1 also limits the Secretary-General's discretion under staff rule 1.2. She alleges that this limitation was contractually established when she entered into the service of the Organization.

III. The Tribunal has reviewed whether the decision to redeploy the Applicant was vitiated by extraneous motivations. It notes the Respondent's contention that the Applicant's redeployment was a "programmatic decision" within the purview of the Secretary-General and a valid exercise of administrative discretion, which could not, therefore, have been motivated by extraneous considerations. Having examined the evidence before it, the Tribunal is satisfied that the decision to redeploy the Applicant was not programmatic but was extraneously motivated.

First, the process that culminated in the Applicant being removed from her post and assigned elsewhere started *before* the relevant Administrative Instruction was issued: on 28 February 1996 - more than a month before the issuance of ST/AI/415 - the Assistant Secretary-General, OHRM, informed the Applicant that her post was to be abolished as of 30 April 1996. Immediately after the Administrative Instruction was issued the post was "frozen", but the decision clearly preceded the Instruction. The Tribunal finds that the Respondent erred in attempting to retroactively justify its decision to abolish the Applicant's post on the grounds of the Administrative Instruction and that, accordingly, the decision of the Assistant Secretary-General, OHRM, is deprived of the "programmatic" character it may have had regarding other staff members selected for redeployment.

Further, other circumstances contribute to the Tribunal's conviction that, far from being programmatic, the decision to redeploy the Applicant was tainted by extraneous motivations: the post previously encumbered by the Applicant was "unfrozen" soon after her redeployment, and another staff member was placed against the post; the functions performed by the Applicant in

drafting the Organizational Manual were not discontinued, but were assigned to a group of junior staff members, whom the Applicant had to instruct; and, the Applicant received no response when she applied for the advertised vacancy of Principal Management Analyst in the Office of the Under-Secretary General for Management, a D-1 level post with the same functions as the P-5 level post of Senior Management Analyst which the Applicant had held. In addition, the Tribunal cannot but consider the offer of a temporary, four-month assignment to Mali as suspect. The Respondent presents this episode as the Applicant refusing a legitimate offer but it clearly failed to recognize the Applicant's request not to be assigned overseas owing to serious health and family reasons (the health reasons seem to have been confirmed as the Applicant developed cancer not long afterwards). Thereafter, only the declaration of the Secretary-General that he had decided to defer action on involuntary separations under the programme, pursuant to discussions in the General Assembly, prevented the Applicant from being separated from service: she had been informed that if she did not indicate immediate willingness to accept a temporary mission assignment, she would be separated by 30 September 1996.

The Respondent's case is further weakened by the fact that the provisions of ST/AI/415 were not followed in the case of the Applicant. Her redeployment was completed without a comparative review being performed. Given the specialized nature of her functions, it is claimed that no other staff members at her level within OHRM were discharging similar functions and that, therefore, it was not necessary to conduct such a review. The Tribunal will address this omission, which it considers a violation of the Applicant's rights of due process, below, but notes that it is yet more evidence of the harassment and discrimination to which the Applicant was subjected. Indeed, the impression given by the dossier in this case is that the Assistant Secretary-General, OHRM, simply did not want the Applicant in his Office. This is reinforced by the fact that when the Applicant applied for the advertised vacancy of Deputy Director, Operational Services Division, OHRM, the post was abruptly withdrawn.

In conclusion, this litany moves the Tribunal to consider that the Applicant was removed from her post because of extraneous motivations. These circumstances do not amount to mere coincidence, but reveal malicious intent and illegal motivation. The Tribunal has consistently held that the *onus probandi*, or burden of proof, is on the Applicant where allegations of extraneous motivation are made. (See Judgements No. 639, *Leung-Ki* (1994); No. 784, *Knowles* (1996); and, No. 870, *Choudhury et al* (1998).) The Tribunal notes that subjective intention is

difficult to prove but may be demonstrated by a pattern of conduct and when that conduct is as heinous as in the instant case, the Tribunal must consider the allegations of extraneous motivation proved. Accordingly, the Applicant will be compensated for the harassment she suffered, including moral injury, and for the ongoing damage to her career prospects.

IV. The Tribunal cannot but express its agreement with the conclusions of the JAB that the Applicant was denied due process on the pretext that a comparative review was unnecessary in her case as her functions were "unique". In a sense, everyone's functions are "unique". The comparison ordered by ST/AI/415 referred to staff members in the "same occupational group", a fact that was completely ignored by the Respondent. The Applicant was part of a large occupational group within her department and had had extensive experience in other fields.

The Tribunal finds that this violation of the Applicant's rights of due process also deserves compensation.

V. Insofar as the Applicant's contention that her redeployment violated her rights under staff rule 109.1 (c) is concerned, the Respondent counters that, as the only administrative decision at issue in this case is that of redeployment, staff rule 109.1 (c), which refers to termination, is of no relevance.

The Tribunal, however, agrees with neither the Applicant nor the Respondent. Had the Applicant been separated from service with the Organization, the Tribunal could have examined whether her rights under staff rule 109.1 (c) had been violated by the application of ST/AI/415. In the instant case, however, any pronouncement of the Tribunal in this regard would be an *in abstracto* speculation on the compatibility of two norms. In fact, the Tribunal is convinced that the redeployment of the Applicant was not a programmatic decision but merely an excuse to get rid of her. Accordingly the Tribunal is not confronted with a genuine case of redeployment.

VI. The Tribunal takes note of the Applicant's plea to consider the Applications for intervention submitted prior to Judgement No. 864, *Madarshahi* (1997) receivable and to order the decision in the instant case to be applied *mutatis mutandis* to the cases of the intervenors. It notes, however, that the intervenors themselves submitted no such Applications in the present proceedings. The Tribunal is satisfied that it has before it sufficient documentation to render

Judgement in the Applicant's case. The Tribunal declines to order that the Judgement be applied to any other case. Should a staff member believe that he or she has a grievance, the appropriate procedure is for him or her to personally pursue the appellate procedures.

VII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation of six months' net base salary at the rate in effect on the date of Judgement; and,

2. Rejects all other pleas.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Marsha ECHOLS
Member

Brigitte STERN
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary